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IN THE

Supreme Court of the United States

October Term, 1940.

No. 349.

E. A. KELLEAM, et al, *Petitioners*

v.

MARYLAND CASUALTY COMPANY, et al, *Respondents.*

BRIEF OF MARYLAND CASUALTY COMPANY, RESPONDENT, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

October Term, 1940.

No. 349.

E. A. KELLEAM, NELL SOUTHARD, JOE E. KELLEAM, and JOE R. SOUTHARD, JR., *Petitioners,*

v.

MARYLAND CASUALTY COMPANY, of Baltimore, a Corp., MRS. ETHEL RIDDLER, MRS. DOROTHY PAYNE, J. K. PERKINS, MRS. F. BATES, GLEN PERKINS, BESSIE MATHEWS, MRS. ELOUISE KLUP, LEGGETTE HALL, LAMAR HALL, MARGUERITE BRADLEY KELLEAM, MARY KATE HALL, KELLEAM HALL, CLIFFORD KELLEAM, KATHLEEN KELLEAM, DR. FANNIN KELLEAM, FRANCIS KELLEAM, MRS. JIMMIE KELLEAM and ROBERT KELLEAM, *Respondents.*

BRIEF OF MARYLAND CASUALTY COMPANY OF BALTIMORE, MARYLAND, RESPONDENT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

In order more fully to acquaint the court with the facts in the case and correct certain inaccuracies and supply omissions we believe that a more detailed statement of the facts should be made as the brief of petitioner does not with sufficient clarity state the facts.

This is an action by a surety on an administrator's bond for protection from a void distribution of the assets of the estate to the exclusion of certain heirs of the decedent. These omitted heirs sought to set aside the void distribution of the estate and from the facts it appeared quite likely under the laws of the State of Oklahoma that the omitted heirs would succeed in vacating the void order of distribution and would then proceed against the surety on the administrator's bond because certain assets of the estate were or had already been placed in hands other than those of the distributees and therefore the surety, alarmed, sought enforcement of its equitable remedy of exoneration.

Leggette D. Kelleam, a resident of Creek County, Oklahoma, died intestate August the 8th, 1936. (Tr. p. 22 and Tr. p. 77.) His heirs, according to the findings of the trial court, were those whose names appear in the transcript at pages 78 and 79. For the convenience of the Court and in order to have a better understanding of the facts the following is the family tree of Leggette D. Kelleam:

W. L. Kelleam,

Wife, Mary Ayres Kelleam,

Children were:

1. Leggette D. Kelleam, deceased.
2. E. A. Kelleam, Sells, Arizona.
3. Nell Southard, Blanchard, Oklahoma.

W. L. Kelleam (same as W. L. Kelleam, above shown to be Mary Ayres Kelleam's husband).

Wife, ...Kelleam.

Children were:

1. Mary Perkins (nee Kelleam), deceased.

Whose children were:

A. Mrs. Fannie Bates, nee Perkins, Yorbalinda, California.

B. Mrs. Bess K. Mathis (Mathew) (named as Mrs. Bessie Bates in the bill of complaint), Santa Anna, California.
C. J. K. Perkins, Milwaukee, Wisconsin.
D. Mrs. Eloise K. Culp (named as Mrs. Elloise or Elouise Bates in the bill of complaint), Long Beach, California.
E. Glen Perkins, Yorbalinda, California.

2. J. M. Kelleam, deceased,

Whose children were:

A. Mrs. Ethel Riddler, Fort Smith, Arkansas.

B. Mrs. Dorothy Payne, nee Kelleam, Galveston, Texas.

3. W. S. Kelleam, deceased.

Whose children were:

A. Clifford Kelleam or Clifford R. Kelleam, Los Angeles, California.
B. Mrs. Kathleen Leiter, nee Kelleam, Los Angeles, California.

4. Kate Hall, nee Kelleam, deceased.

Whose children were:

A. W. L. (Leggette) Hall, Little Rock, Arkansas.
B. Mrs. H. H. Bradley (Marguerite or Margarite Bradley, nee Hall), Alhambra, California.
C. Lamar Hall, Waldron, Arkansas.
D. Mary Kate Hall, Alhambra, California.
E. Kelleam Hall,..... (alleged in complaint to be a citizen and resident of Arkansas or Oklahoma). (Tr. 6) (Testimony of Ethel Riddler that all of heirs live either in Oklahoma, Arkansas or California.)

5. Mrs. Clyde Bates, nee Kelleam, deceased (Mrs. Klyde Bates whose surviving husband and children (Tr. 39) entered into stipulation of settlement with E. A. Kelleam).

6. Mrs. Fannie Bates, nee Kelleam, Fayetteville, Arkansas.

7. Dr. R. T. Kelleam, deceased,

Whose children were:

A. Dr. Fannin Kelleam (F. Q. Kelleam), Amarillo, Texas.
B. Francis Kelleam, Oklahoma City, Oklahoma.
C. Jimmie Kelleam (shown as Mrs. Jimmie Kelleam in bill of Complaint), Oklahoma City, Oklahoma.
D. Robert Kelleam, Texas.

On August 25, 1936, E. A. Kelleam and Nell Southard nee Kelleam, full brother and sister of the deceased Leggette D. Kelleam, filed a petition in the County Court of Creek County for the appointment of E. A. Kelleam as administrator. (See Tr. p. 22.) In this petition they alleged that they were the sole and only surviving heirs. They omitted giving the names, ages, and residence of other heirs of the deceased as required by the Oklahoma Statute (Okla. St. Ann., Title 58, Sec. 127) (O. S. 1931, Sec. 1142) and gave no notice as required by the statutes. (Okla. St. Ann., Title 58, Sec. 128) (O. S. 1931, Sec. 1143.)

On the same day without notice E. A. Kelleam was appointed administrator and duly qualified as such by filing and executing a bond in the sum of $12,000.00 upon which bond this respondent Maryland Casualty Company is surety. (Tr. p. 25) He filed an inventory. (Tr. p. 32) Assets exceeding $25,000.00 were listed. He filed a final report. (Tr. p. 32) In the final report the administrator E. A. Kelleam charged himself with receiving items after the death of the deceased. (Tr. p. 35) This charge was approximately $6,000.00 in cash.

He filed his petition for determination of heirship and for a decree of distribution again alleging that he and his sister were the sole heirs of E. A. Kelleam, deceased.

All of the remaining half sisters and children of deceased's half brothers and half sisters were completely omitted from this request for distribution.

Evidently prior to the hearing of the final account and distribution Fannie Bates, a half sister, and children of Mrs. Klyde Bates learned of the probate proceedings and

contacted E. A. Kelleam and Nell Southard concerning same.

It is important to learn at this point that under the laws of descent and distribution in Oklahoma heirs of the decedent who were half blood kindred inherited equally with those of the whole blood. (Okla. St. Ann., Title 84, Sec. 221) (O. S. 1931, 1626.)

> "Kindred of the half-blood inherit equally with those of the whole blood in the same degree, unless the inheritance came to the intestate by descent, devise or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestors must be excluded from such inheritance."

If the estate of E. A. Kelleam was an ancestral estate, that is, descending to him by descent, devise, or gift of someone other than an ancestor of the half blood kinsmen, then the half blood kinsmen could not share in the inheritance.

A contract was then executed by E. A. Kelleam and Nell Southard on the one hand and Fannie Bates and the surviving husband and children of Mrs. Klyde Bates now deceased whereby Kelleam and Nell Southard agreed to deposit $4,000.00 in the bank together with the contract (see Tr. p. 39 *et seq.*) and it was agreed that this sum should be paid to them for any interest they claim in the estate providing none of the heirs of any of the other half brothers or half sisters of the deceased came in and filed a claim. But that if, prior to final distribution any party claimed to be interested in the estate and appeared in the County Court and questioned the right of E. A. Kelleam and Nell Southard to the entire estate, then Kelleam and Southard would be entitled to withdraw the $4,000.00 in escrow. The contract also provided that it did not constitute the entering of an appearance in the County Court by Fannie Bates or the heirs of Mrs. Klyde Bates.

After the execution of this contract and before the final hearing for distribution an amended petition for approval

of final account and for decree determining heirship and distribution of the estate was filed by E. A. Kelleam and Nell Southard. (Tr. p. 43.)

This amended petition, after setting out the family tree of the Kelleams, averred that one Mary Ayres Kelleam, one and the same as M. A. Kelleam, was the mother of the deceased Leggette D. Kelleam and of E. A. Kelleam and Nell Southard, nee Kelleam, and that these three were her sole heirs and were the only heirs of the deceased Leggette D. Kelleam. The amended petition deliberately and we believe with intention to defraud all of the half blood kinsmen, went on to allege that all of the property of which Leggette D. Kelleam died seized was an ancestral estate coming from his mother to the deceased. The petition recited that the deceased owned at the time of his death an undivided seven-sixteenths of the working interest and a one-eighth of the overriding interest in the Sam Vance lease, an oil and gas lease, in Creek County, Oklahoma, describing same.

Then the petition went on to set out that the mother of the deceased during her lifetime, and as an advancement to the said Leggette D. Kelleam, in lieu of a portion of his share of her estate purchased for him all property owned by the deceased Leggette D. Kelleam at the time of his death.

Without going into the argument which will be later developed, but in order that the Court may have a better understanding of this case we desire to call attention to the fact that the mother, Mary Ayres Kelleam, died on December 4, 1928. (Tr. 100) Also in order to show how patently a fraud the foregoing petition was, together with the subsequent distribution by the County Court of Creek County, we desire to call this court's attention to numerous items which, if they were gifts, or advancements, would have been given to the decedent, Leggette D. Klleam, by his mother from the "Hereafter," as at the time he acquired them she had been dead for several years. For instance at page 99 of the

transcript, we see that the two Drumright, Oklahoma, properties were acquired by Leggette D. Kelleam, one in 1932, and the other in 1935. Also the Oklahoma City properties (Tr. 122) were acquired in 1933. The interest in the so-called Sam Vance lease was acquired in 1930. (Tr. 117) The inventory filed by the administrator also lists certain items that by no stretch of imagination can be termed ancestral, or called gifts or devises, or inherited property from the departed maternal ancestor. For instance at page 28 of the transcript appears a Ford coupe, 1936 model, and also a promissory note of R. J. and Nell Southard dated 4/6/29 for $4,000.00, a note from Grover Keely dated 6/12/1929 for $100.00. Also a note from R. J. and Nell Southard for $1,000.00 dated 9/8/1931, also a note from Pleas Carter for $25.00 dated 4/3/1935, and a note from R. J. and Nell Southard dated 9/8/1931 for $700.00, and a note from J. M. Pinkston and Lou Ann Pinkston dated 6/22/1929, for $400.00.

Thereafter on the day appointed for the hearing the County Court entered its judgment order and decree finding and determining that the estate of Leggette D. Kelleam, deceased, was a maternal ancestral estate and ordered distribution threof to E. A. Kelleam and Nell Southard.

The only notice purportedly given the half blood heirs was a notice by publication. The order appears in the transcript pages 46 to 52. On September 23, 1937, a petition to reopen the proceedings was filed (Tr. p. 123) and an amended petition was filed on December 28, 1937. (Tr. p. 125 to 128) This amended petition was filed by the children of the prior deceased's half brothers and half sisters of Leggette D. Kelleam, deceased, setting forth their relationship to the deceased and stating that they had no notice of these proceedings and that the distribution of the estate was fraudulently and collusively obtained and asking that the decree of the County Court be set aside.

The Maryland Casualty Company surety on the administrator's bond learned of these proceedings and that Dr.

E. A. Kelleam was divesting himself of title to the assets. (Tr. p. 109)

It will be noted that none of the defendants deny that E. A. Kelleam and Nell Southard were divesting themselves of the properties but admit it in their various answers. (Tr. p. 64 and 68) Obviously if the half blood heirs succeeded in vacating the order of distribution then the surety would be called upon to pay the half blood heirs if no recovery could be had by them from the administrator and Nell Southard.

Accordingly, to protect itself, a representative of the Maryland Casualty Company was sent to interview E. A. Kelleam in an effort to secure the company from harm. (Tr. pp. 104, 109) The purpose of this visit is clear from the testimony of the representative J. C. Thomas. Thomas said "We wanted this property conserved in event the heirs that brought this action in Creek County were able to successfully come in and reopen the case." "I just suggested that he put this property where it could be on hand in the event they were successful in reopening the case. I didn't have any definite proposition any certain place he should put it. He knew what I was talking about."—"I just suggested to Dr. Kelleam that it might be well to keep this property so if these people were successful in reopening the estate it would be available to pay it off"—"My idea in going to see Dr. Kelleam was to try to work out an arrangement where the Maryland Casualty Company would be protected in event there was a claim."

Thomas also testified that at the time he talked to Dr. Kelleam conveyances had been made by him and his sister, Nell Southard in an attempt to put the corpus of this estate in their children. This representative got no satisfaction. Later in the proceedings another effort to get E. A. Kelleam to indemnify or satisfy the Maryland Casualty Company was made. (See the testimony of Streeter Speakman at page 109 of the transcript and also his letter to E. A. Kelleam transcript page 111) The letter says:

"The thing that has raised their suspicion and caused them to take a hostile attitude toward you is the fact that you made a transfer of this property to your son. This of course was made without my advice or knowledge and if you had consulted me I would have advised you in the first instance to desist from such a procedure."

Meanwhile E. A. Kelleam and Nell Southard demurred to the amended petition in the County Court and on September 15, 1938, the County Court sustained the demurrer and the proceeding to reopen was dismissed. (Tr. p. 102) The case was appealed by the petitioners to the District Court of Creek County where it remained on appeal and is still pending.

The Maryland Casualty Company on June the 8th, 1938, sought relief in the United States District Court for the Northern District of Oklahoma by filing its bill of complaint making the full blood heirs as well as the half blood kinsmen of the deceased Leggette D. Kelleam defendants seeking exoneration on its bond and asking that a receiver be appointed to preserve the decedent's property pending the outcome of the dispute between the heirs (Tr. pp. 5-11) and that the property be impressed with an equitable lien to satisfy and discharge any final judgment that might be obtained between the litigating parties.

An amended complaint was subsequently filed. (Tr. pp. 55-60) The complaint and amended complaint together with the answer and cross petition of the defendant Mrs. Ethel Riddler and Mrs. Dorothy Payne and others similarly situated set out clearly the contention of this respondent. (Tr. pp. 11-22) The complaint set out that certain of the assets of the Legette D. Kelleam estate were within the Northern District of Oklahoma. (Tr. pp. 6 & 7) The defendant Mrs. Frances Kelleam was served with a chancery subpoena on June 14, 1938. On June 18, 1938, the cross petitioners filed their separate answer and cross petition wherein they asserted their claim to an interest in the

estate and joined in the application for the appointment of a receiver.

On June 23, 1938, J. M. Scott was appointed receiver of certain assets of the estate of Leggette D. Kelleam. (Tr. p. 94) These assets consisted only of the Drumright Creek County, Oklahoma, real estate and the Oklahoma City, Oklahoma, real estate and the Sam Vance oil and gas lease in Creek County, Oklahoma.

Thereafter on June the 25th, 1938, plaintiff in compliance with title 28, Sec. 118 U. S. C. A. procured issuance of an order for service on defendant outside of district. (Tr. pp. 52 and 53) Order was served upon the defendant E. A. Kelleam and Joe E. Kelleam personally at Sells, Arizona. (Tr. pp. 53 and 54) Previously a chancery subpoena had been issued and served upon the defendant Nell Southard and J. R. Southard, Jr., at Blanchard, Oklahoma, on July 17, 1938. All these four defendants after filing special pleas to the venue and jurisdiction of the court and upon such pleas being overruled they moved to strike the cross petition for want of jurisdiction of the subject matter which was overruled and the defendants then filed their answer and plea in abatement and answer to the cross petition (these various pleadings appear Tr. pp. 61 to 70). With the issues having been joined the cause was tried and for the testimony developed we refer the court to the summary of the record, evidence, and proceedings at the trial. (Tr. pp. 93 to 123) The trial court made findings of fact and conclusions of law and entered its decree. We desire at this point to controvert the statement of counsel in page 3 of the petition for certiorari as well as the statement at page 9 concerning the purpose of this respondent surety, by stating that nowhere in this record does it appear that there is any plan between the surety and the contesting claimants to circumvent the judgments of the County Court. But counsel in their brief lose sight of the fact that this action is one where a surety resorts to the Federal Court for protection from what appears by all the law and decisions of

Oklahoma to be a very hazardous situation as will be more fully developed in the argument. The court found that the estate of Leggette D. Kelleam was not an ancestral estate; that the decree of the Court was obtained by fraud and was therefore void; that the half sister and children of the prior deceased's half brothers and half sisters were heirs and entitled to share in the estate; that E. A. Kelleam and his surety were liable to the defrauded heirs; that the surety company was entitled to exoneration and to have the assets impressed with a trust. The findings of fact and conclusions of law (Tr. pp. 77 to 88) and the decree (Tr. pp. 88 to 92). This decree is in accordance with the conclusions of the court and it provided for an accounting and that if no accounting be rendered, then the lien on the property in the hands of the receiver be foreclosed.

From this decree an appeal has been taken.

ARGUMENT.

We will endeavor point by point to respond to the points raised by counsel in the brief of petitioners.

As to Petitioners' Point I.

Jurisdiction of the County Courts of Oklahoma in probate matters is exclusive original jurisdiction.

With this contention we have no quarrel, however, we submit a counter proposition:

THE UNITED STATES DISTRICT COURT, ALTHOUGH IT HAS NO JURISDICTION IN PROBATE TO REVIEW, VACATE OR SET ASIDE DECREES OF THE COUNTY COURT EXERCISING PROBATE JURISDICTION NOR TO DETERMINE HEIRSHIP, DOES, HOWEVER, HAVE POWER TO DEPRIVE A PARTY OF THE BENEFITS OF A JUDGMENT OR DECREE FRAUDULENTLY OBTAINED IN A STATE COURT, PARTICULARLY A VOID JUDGMENT.

Among the cases cited by counsel is the case of *Wells* v. *Helms, et al.*, 105 F. (2d) 402, but a study of the facts of

this decision discloses that all the purported and contesting heirs were vigorously in court and had their day in court in the probate proceedings and were found by the probate court not to be heirs. No one can read the record in the instant case, and then be familiarized with the decisions of the Supreme Court and say that the half blood heirs had their day in court until the decision of the trial judge in the instant case.

That the half blood brothers and sisters, and their heirs, where the particular half-brother or half-sister of Leggette D. Kelleam had died, were entitled to share in the estate of the deceased Leggette D. Kelleam is not disputed but is clear under the Oklahoma law of descent and distribution.

Okla. St. Ann., Title 84, Section 213:

> "When any person having title to any estate not otherwise limited by marriage contract, dies without disposing of the estate by will, it descends and must be distributed in the following manner:
>
> * * * * * * * * * *
>
> "Third. If there be no issue, nor husband nor wife, nor father, nor mother, then in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation; if the deceased, being a minor, leave no issue, the estate must go to the parents equally, if living together, if not living together, to the parent having had the care of said deceased minor."

That the estate of Leggette D. Kelleam was not an ancestral estate is clear from the facts. There were assets, both personalty and realty that were not even in existence when the mother of Leggette D. Kelleam died in 1928. Yet both Nell Southard and E. A. Kelleam in their amended petition to distribute the estate to themselves (Tr. 45) say in that petition:

> —"that the said mother of the deceased, during her life time and as an advancement to the said Leggette D. Kelleam, in lieu of a portion of his share of her

estate, and as a gift, *purchased for him all property owned by the deceased,* Leggette D. Kelleam at the time of his death."

If the estate was ancestral, the half blood heirs were excluded, if it was not ancestral they were entitled to inherit. If it was not ancestral the order of the court distributing the entire estate to E. A. Kelleam and Nell Southard was void and the court had no power to deprive the half blood heirs of their rights.

This is clearly the law in Oklahoma.

A case quite in point is that of *Beatty* v. *Beatty,* 114 Okla. 105, 242 Pac. 766. This case has never been reversed. The facts were that one S. W. Beatty died owning land in Lincoln County, Oklahoma. He left a wife. He left a son, S. W. Beatty, Jr., and three daughters, Lelia Berry, Laura Bradley, and Sadie White. There was a son, Jeff Beatty, who had predeceased S. W. Beatty, leaving Ethel Beatty and Lula Stewart and Matthew Beatty, sons and daughters.

Mrs. Beatty, widow of S. W. Beatty, died. S. W. Beatty, Jr., was appointed administrator, and administered the estate. He gave no notice to the Jeff Beatty children, did not list them as heirs and distributed the lands of old S. W. Beatty to himself and his three sisters. He claimed in the petition for appointment of administrator, and in the petition to settle the final account that he and the three sisters were the sole heirs. Final distribution was made and over two years later Jeff Beatty's children filed a partition suit in the District Court. The trial court found that the proceedings had in the County Court and the decree so rendered were and are null and void and of no effect because the Jeff Beatty children were not made parties to the administration proceedings, and had no notice thereof. The court also found that the proceedings were fraudulent, and that the final decree was fraudulent, and obtained by reason of fraud practiced upon the court in that S. W. Beatty represented to the court that he and his three sisters were

the only heirs of S. W. Beatty, deceased. The reasoning of the court is entirely applicable to the case at bar, and we refer the court to this decision as the law in Oklahoma. The court says in its opinion:

> "We can conceive of no clearer case of fraud than appears in this case on the part of the administrator, S. W. Beatty. Being fully aware of the whereabouts of these parties and of their interest in the estate, or at least of the fact that they were heirs, whether he recognized their interest or not, he makes solemn oath that he and his codefendants are the only heirs, and, though he was corresponding with Ethel Beatty in April and October, 1917, shortly before the institution of the probate proceedings herein and again shortly after, as shown by the record herein, in November, 1918, early in 1919, and in December, 1919, yet he failed to advise them of the contemplated probate proceedings or to advise the court that these parties were heirs and claimed an interest in said estate, all of which he well knew, thus perpetrating a fraud both on the court, and the judge thereof, and upon the parties.

Further, and most applicable, the court says:

> "It is very apparent from the record in this case that the fraud complained of prevented the defendants from having a fair hearing—indeed, they had no hearing at all—and that its purpose was to keep the complainants in ignorance of the pendency of the action and thus prevent them from having a trial and presenting their case fully.

We believe that this case answers nearly every contention raised by petitioners in their brief regarding the finality and sanctity of the final decree in the County Court, and clearly supports our contention that the surety had occasion to be alarmed and could see that ultimately it would be called on to respond and pay any judgment awarding the cross-petitioners their just portion of the estate.

There are other Oklahoma Cases where the Oklahoma

Supreme Court has held void various forms of fraudulent final decrees of distribution and other decrees. These cases are as follows:

Caulk v. *Lowe*, (Sup. Ct. of Okla.) 74 Okla. 191, 178 Pac. 101;
Green's Estate, 80 Okla. 256, 196 Pac. 128;
Dawkins v. *Peoples Bank & Trust Co.*, 117 Okla. 181, 245 Pac. 594;
Forgy v. *Lauphear*, 144 Okla. 245, 291 Pac. 83;
Wheeler v. *Bighcart*, 172 Okla. 262, 43 P (2) 1077.

These cases are conclusive, and when they are studied by the Court, we feel confident that the Court will conclude that the invalidity of the final decree is quite apparent, and that they will convince the Court that the alarm of the surety was not a feigned alarm, and that the exoneration of the bond by the County court was not an exoneration of the bond at all, as contended all through petitioner's brief.

Plaintiff sought in this case, not to have the United States District Court exercise probate jurisdiction, but to be exonerated and protected from harm. It had given its recalcitrant and uncooperative principal, E. A. Kelleam, two opportunities to retain control of the property he had acquired in the distribution, but had gained no cooperation; instead the property was being transferred to sons and daughters of the distributees without consideration.

The prayer for relief in the original complaint and in the amended complaint sets out clearly the purpose of the action (Tr. 10)

Respondent sought to have a receiver appointed to conserve the property belonging to the estate to await the outcome of the litigation between the Kelleam-Southard full-blood relatives, on the one side, and upon the half-blood kinsmen on the other; and to impress a lien upon the property to satisfy any claim of the adverse defendants, and to exonerate and hold this respondent harmless from any liability on the bond of E. A. Kelleam.

That it was entitled to this remedy is supported by the following authorities. Oklahoma Statutes Annotated, Title 12, Section 1551, OS, 1931, Sec. 773.

> "A receiver may be appointed * * *"
>
> "First. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of any party whose right to or interest in the property or fund, or the proceeds thereof, is probably, and where it is shown that the property or fund is in danger of being removed or materially injured."
>
> "Sixth. In all other cases where receivers have heretofore been appointed by the usages of the courts of equity."

That this respondent was entitled to proceed against its principal before it was called upon to pay under its bond, and that it had a claim in equity against its principal that it could enforce in equity is supported by statute. Oklahoma Statutes Annotated, Title 12, Section 1108, OS, 1931 Sec. 88.

> "A surety may maintain an action against his principal, to obtain indemnity against the debt or liability for which he is bound, before it is due, whenever any of the grounds exist, upon which, by the provisions of this code, an order may be made for arrest and bail, or for an attachment."

The Oklahoma Supreme Court has permitted such action for exoneration in the case of *Walton, et al.*, v. *Williams*, 5 Okla. 642, 49 Pac. 1022. In the *Walton* case plaintiffs were sureties on the bond of agents for a brewing company given by the agents for the faithful performance of their duty. Plaintiffs filed a suit alleging that the principals were short in their accounts and had defaulted the conditions of the bond and asked an indemnifying judgment for the amount of the shortage. A demurrer was sustained

and an amended petition was sought to be filed which was refused by the court. In the amended petition plaintiffs alleged the shortage, the contract of suretyship, and that the brewing company was notifying plaintiffs of the default, and had made demand upon the principal debtors for payment of the money. The court refused to permit the amended petition to be filed and dismissed the cause. Before the demurrer was sustained an attachment had been issued by plaintiffs on property of the principal obligors and also a receiver had been appointed for one of the debtor's interest in a drug store. In the amendment to the petition it was also alleged that the defendants were seeking to dispose of their property without indemnifying the plaintiffs.

In construing the statute on the rights of sureties the court said:

> "In this case the plaintiffs in both petitions prayed that the defendants be ordered and adjudged to indemnify them, and that, failing so to do, plaintiffs have judgment for the amount of their liability as sureties, and the petitions set forth the grounds which would authorize an order of attachment. This statute was meant to change the common law rule, so that a surety should not be compelled to stand by and see the principal, for whose obligations he was bound, fraudulently dispose of his property, and leave his just debts to be paid by those whom he had deluded into becoming his sureties. The court erred in sustaining the demurrer to the petition and in refusing to permit the piaintiffs to file an amended petition."

Further, on the question of a surety's right of exoneration there are some interesting cases which refute petitioners' contention that the situation was a novel and unprecedented one, and which show how the courts protect this right of a surety.

Morley Construction Co., et al., v. *Maryland Casualty Company*, (C. C. A. 8th Cir., 1937) 90 F. (2d) 976:

1. " 'Quia timet' is a name given to a bill in equity filed by a person fearing some future injury to his rights in property, real or personal, from the negligence, fault, or fraud of another."

2. "Where surety on construction bond given in connection with public building contract, seeking to compel application of installments paid on contract to payment of labor and materials going into building, alleged that outstanding bills amounted to more than $100,000, that the final estimate together with balance of funds on hand from prior installments which had been paid did not equal that sum, and that insolvent construction company unless restrained would convert or conceal funds, resulting in irreparable loss to surety, surety was entitled to remedy of exoneration."

Certiorari was denied 302 U. S. 748, 82 L. Ed. 578, 58 S. C. 266; rehearing denied, 302 U. S. 779, 82 L. Ed. 602, 58 S. C. 362.

In that case the relief sought by the surety was to impress a trust or lien upon funds paid its principal, the contractor of a public building, and the federal government had paid the contractor by checks which were deposited in a Kansas City, Mo. bank. The Supreme Court of the United States in the case of *Morley Construction Co.* v. *Maryland Casualty Co.*, 300 U. S. 185, 81 L. Ed. 593, held that the cause should be remanded to the Court of Appeals to pass upon the question whether relief in the form of exoneration is proper under the circumstances. This was done in 90 F. (2) 976, and certiorari denied as above indicated.

There are other cases illustrative of a surety's right of exoneration that are strong and well reasoned cases.

Glades County, Fla., v. *Detroit Fidelity and Surety Company*, (C. C. A. 5th Cir.) 57 F. (2) 449. This case is quite instructive.

"As between surety and bankrupt contractor whose trustee refused to pay material men, equity of exoneration held to arise without payment by surety and without suit against it."

Receivership is a proper remedy for enforcing the right of exoneration.

Sanford v. *United States Fidelity & Guaranty Co.*, (Ga. Sup. Ct. 1902) 116 Ga. 689, 43 S. E. 61.
Central Surety & Ins. Corporation, et al. v. *Bagley*, (Dist. Ct. S. D. Calif., Cent. Div.) 44 F. (2d) 208.

There are many other cases where equity has recognized a surety's rights of exoneration and enforced it in many ways. Injunctions have been granted, receivers appointed, and equitable garnishments have been granted, and funds traced and applied, as stated in *Glades County, Florida* v. *Detroit Fidelity & Surety Co.*, previously cited, at page 452, of 57 F. (2).

Petitioners in their brief at page 18 say nothing about the ancestral feature of the case, but do claim that the failure to give personal notice to the claimants who they contended were not heirs, or to assert that they were not heirs, was not fraud. To show how petitioners and their counsel who engineered the distribution were ignoring the well settled law on what is or is not ancestral property in order to persuade the county court that the estate was ancestral we refer to the general law upon this subject as set out in 18 CJ. p. 818, Sec. 20. (5). At page 819, the text states:

> "On the other hand, property of the intestate does not possess an ancestral quality where it was acquired by the intestate with the proceeds of ancestral property, or where the property was acquired by exchanging ancestral property therefor, * * *."

The petitioners shun this entire feature of the case because if the estate was not an ancestral one, the decree is void, and our contention on this point, we submit, is absolutely unanswerable.

As to Petitioners' Point II.

Counsel state as their second point: That jurisdiction was duly invoked and exercised prior to the institution of the instant proceedings as to both the subject matter and the parties.

This point is merely a repetition of the first point that the county court had exclusive jurisdiction. In answer to this point we call attention to the quotation from the record at page 107, where the following question was asked of Mr. Thomas. "Q. Mr. Green did appear in the county Court?" "A. That is right, he was representing the Maryland Casualty Company." There is nothing in the record to show that the appearance of the Maryland Casualty Company in the proceedings in the County Court of Creek County was other than a special appearance and motion. (Tr. 101)

The inference, therefore, that the surety was a party to the proceeding in the County Court is not justified by the record.

We have no quarrel with the authorities that no personal notice of a decree of distribution is needed. However, as has been previously shown, where heirs have had no notice of the petition for appointment of administrator and have not been named as heirs in the petition, the order distributing property of a decedent is void as to them.

Counsel at page 17 of the brief of petitioner cite *Wheeler* v. *Bigheart*, 172 Okla. 262, 43 P. (2) 1028, as authority for the proposition that the County Court had jurisdiction to review its own decree for fraud or irregularities. Even though the County Court sustained the demurrer, the question had not been settled on appeal, the case cited is ample authority for our contention that a decree fraudulently obtained distributing property to the exclusions of known heirs is a void decree. Therefore we submit that it is clear from the facts in the case that the cross petitioners who are the defrauded heirs will some day call upon the surety to pay the equivalent of that which was wrongfully taken

from them, and therefore the surety is entitled to the equitable remedy of exoneration.

As to Petitioners' Point III.

Counsel state as the petitioners third point: It was the duty of the federal court when suit was there filed to dismiss for want of jurisdiction.

Petitioners' contentions under this point will be divided under (a), (b), (c)(1), and (c)(2), and will be discussed accordingly.

(a)

Because the jurisdiction of the County Court had already been invoked.

In response to this contention, this point we believe is the same as point II. Counsel state that federal courts do not have general probate jurisdiction to review judgments of the state courts. Such is not this case and as we have previously pointed out this is a suit in exoneration by a surety, wherein the cross petitioner, who are the defrauded heirs seek to join in the litigation in the federal court once the action had been filed by the surety for exoneration. One of the cases cited by counsel under this section of their brief is that of *Byers* v. *McAuley,* 149 U. S. 608, 37 L. Ed. 867. This case is not in point and even goes so far as to hold in support of our contention:

> "Where the estate of a deceased is ready for distribution, but no adjudication has been made as to the distributees, the Circuit Court can entertain jurisdiction in favor of citizens of other states to determine and award their shares in the estate."

The *Byers* case does hold that the federal courts will not disturb the possession of the administrator duly appointed by the state probate court. However, in the instant case the federal court is in no manner trying to oust the probate court of jurisdiction, or disturb the administrator in his possession as administrator, but is merely lending its

equitable aid to assist a surety in salvaging something of the wreckage of a badly administered estate.

Regarding *Smith* v. *Jennings*, (C. C. A. 5th Cir.) 238 Fed. 48, we desire to urge that this case is not in point for it is a case where heirs of an estate sought to have a receiver appointed pending the probate of an estate by the state court. The grounds urged for the appointment were that the appointment of temporary administrators was invalid because of fraud, and because the assets of the estate were being dissipated. The Circuit Court of Appeals held that federal courts had no authority to stay proceedings in the state court, and further that the assets of the estate were amply protected by a substantial bond.

In support of the contention of this respondent, the court does say that relief to set aside judgment obtained by fraud can be had as against a final judgment of the state court when there is an attempt to enforce it, citing *Simon* v. *Southern Ry. Co.*, 236 U. S. 115, 35 Sup. Ct. 255, 59 L. Ed. 492.

The United States Supreme Court has held in *Marshall* v. *Holmes*, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. Ed. 870, that the United States Courts, in the exercise of equity powers, and where diversity of citizenship gives jurisdiction over the parties, may deprive a party of the benefit of a judgment or decree fraudulently obtained in a state court, as the decree of the federal court operates on the parties, and not on the state court.

The case of *Hewitt* v. *Hewitt*, (C. C. A. 9th Cir.) 17 F. (2) 716 is another case showing the powers of a court of equity. This case will be more fully discussed by the other respondents who were cross-petitioners, but we refer to it to show the court that federal courts in the exercise of their equity jurisdiction can deprive a party of a judgment fraudulently obtained in the state court:

> 1. "A court of the United States, in the exercise of its equity powers, and where diversity of citizenship gives jurisdiction over the parties, may deprive a party

of the benefit of a judgment or decree fraudulently obtained in a state court, since its decree operates on the parties and not on the state court."

"2. A fiduciary relation exists between an administrator and the heirs of the estate."

3. "The administratrix of the estate of her deceased husband, who died intestate, had been told by him that, previous to his marriage to her, he had adopted a son, but had heard that the son was dead. Later, and within two years before his death, he made a will, of which she knew, which contained provision for the son. The administratrix did not inform the probate court nor her counsel of such facts, and the estate was settled aid distributed to her and a daughter without any reference to or knowledge of the adopted son. Held, that her silence constituted a fraud upon him against which a federal court of equity would grant relief by requiring the distributee to restore his share of the estate."

The applicability of this case will be obvious upon a reading of the facts.

(b)

Under their third point petitioners assert that the action was not local under 28 U. S. C. A., Secs. 116-118.

There are two phases of this point that must be answered. Counsel say that the surety had no lien upon the decedent's estate by contract or otherwise. The other is that relief *in personam* was granted when the action was *in rem*. In order to analyze and answer this contention we refer to the section of the statute under which this action was brought against E. A. Kelleam and Joe Kelleam, who were citizens and residents of Arizona. We submit there is no question about the jurisdiction of the court over Mrs. Nell Southard and J. R. Southard, Jr., as the record shows they were served with process in the Eastern District of Oklahoma (Tr. 95) although this was done after the receiver was appointed.

The statute under which the action was filed is as follows: Title 28, U. S. C. A., Section 118: "Absent Defendants in Suits to Enforce Liens."

"When in any suit commenced in any district court of the United States to enforce any *legal* or *equitable lien* upon or *claim* to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks. In case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order and of the performance of the directions contained in the same it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district; and when a part of the real or personal property against which such proceedings shall be taken shall be within another district, but within the same State, such suit may be brought in either district in said State. Any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said dis-

trict court, and thereupon the said court shall make an order setting aside the judgment therein and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law." (Italics supplied)

That the surety had a claim in equity for exoneration upon the land and property which was sequestered by the receiver sufficient to satisfy the requirement of the statute that an equitable lien or claim existed is clear from the facts and supported by the authorities. When the administrator distributed the property to himself and his sister Nell Southard, under the case of *Hewitt* v. *Hewitt,* those parties took possession and title of the property impressed with an equitable lien or trust for the defrauded heirs.

That a surety has an equitable claim against the property is supported by the following decisions.

Morley Construction Co., et al. v. *Maryland Casualty Co.*, 90 F. (2) 976;
Glades County, Fls., v. *Detroit Fidelity and Surety Co.*, 57 F. (2) 449;
Southwestern Surety Ins. Co. v. *Wells et al.*, 217 F. 294;
Walton v. *Williams*, 5 Okla. 262, 43 P. (2) 1028;
Des Moines Bridge & Iron Works v. *Plane et al.*, 163 Iowa 18, 143 NW 866;
Taylor v. *Harris' Admr. et al.*, 164 Ky. 654, 176 SW 168;
Republic Nat. Bank & Trust Co., et al. v. *Massachusetts Bonding & Ins. Co.*, (C. C. A. 5th Circuit) 68 F. (2) 445.

In their second point Counsel also seeks to state that the decree showed no relief *in rem* but that the relief was granted *in personam.* We submit that the decree of the trial court makes no attempt to act in any way except against the *res.* (Tr. 88 *et seq.*)

That such a lien or equitable claim is created by the act of the administrator in distributing the property, and ex-

isted when the suit was filed and before, is clear from the facts and supported by authority.

Porter et al. v. *Cooke et al.*, 63 F. (2) 637.

A suit to establish a trust in real estate may be brought under Section 118, U. S. C. A., Title 28, though it also seeks an accounting, *Porter Land and Water Co.* v. *Baskin*, 43 F. 323.

The facts were also sufficient to vest the United States Court for the Northern District of Oklahoma with jurisdiction. The controversy involved real estate and personalty of a fixed character in Creek County, Oklahoma, within the Northern District of Oklahoma. The controversy also involved real estate which lay in districts within the same state. Title 28, U. S. C. A. Sec. 116. This section was applicable to support the jurisdiction.

> "Any suit of a local nature, at law or in equity, where the land or other subject-matter of a fixed character lies partly in one district and partly in another, within the same state, may be brought in the District Court of either district; and the court in which it is brought shall have jurisdiction to hear and decide it, and to cause mesne or final process to be issued and executed, as fully as if the said subject-matter were wholly within the district for which such court is constituted."

We feel certain that the court below was correct in holding that the action was a local action, and that the trial court properly had jurisdiction.

(c) (1)

Petitioners state further that there was no diversity of citizenship between the real parties in interest as required by the Statute.

Further that the parties should be aligned in accordance with their actual interests to test jurisdiction. We believe that there is only necessity to refer to one case to show that petitioners are wrong in their contention.

Republic Nat. Bank & Trust Co., et al. v. *Massachusetts Bonding & Ins. Co.*, (C. C. A. 5th Cir.) 68 F. (2) 445.

> "That some of resident defendants in nonresident surety's action seeking application of retained fund to discharge of claim favored relief prayed, occasioned no realignment of parties to destruction of surety's right to federal jurisdiction.
>
> "Where surety sued as nonresident seeking application of retained fund to discharge obligations and made numerous resident claimants parties defendant, dependent jurisdiction arose to settle disputes, even between citizens of same state and involving amount less than $3,000, so far as necessary fully to administer fund."

We believe that this decision also supports clearly the jurisdiction of the trial court, and the court expressly says that no realignment of parties is necessary.

(C) (2).

Petitioners assert under this phase of the brief that the burden of proof of the jurisdictional facts was upon this respondent. We assert that diversity of citizenship was alleged in the complaint and was proven to the satisfaction of the trial court.

Respondent (Plaintiff below) Maryland Casualty Company, is alleged to be a Maryland corporation. Defendant E. A. Kelleam, in his separate answer (Tr. 61 at p. 62) admits this allegation. The bill of complaint alleges that E. A. Kelleam is a resident of Sells, Arizona, to which allegation the defendant filed an answer admitting he was such a resident. (Tr. p. 62) Likewise Joe Kelleam similarly filed an answer to a similar allegation (Tr. p. 65).

In the bill of complaint it was alleged that all of the other defendants are residents and *citizens* of the State of Arkansas, and the State of Oklahoma. (Tr. p. 6.) In the answer and cross petition allegations as to where each relative and party resided are set out in detail with the exception of that of Clifford Kelleam, and Kelleam Hall. (Tr. pp. 11 and 12.)

There was testimony (Tr. 118-19) regarding where all the defendants and cross petitioners lived. Mrs. Ethel Riddler, testified that she lived in Ft. Smith, Arkansas, and that all of these named heirs, referring to a list of kin-folks she had, live either in Oklahoma, Arkansas, or California. There was certainly evidence that all of the defendants and cross-petitioners lived in some state other than the state wherein plaintiff corporation was organized. Even as to Kelleam Hall, it was alleged in the original complaint that he was a resident and citizen of Oklahoma or Arkansas, along with the other defendants (Tr. p. 6) and the testimony of Mrs. Ethel Riddler (*supra*) was that he lived either in Oklahoma, Arkansas or California.

Also the trial court from all the evidence found that places of residence of the various heirs was as set out in the findings of fact (Tr. pp. 78-79). Also the evidence at the trial was sufficient to satisfy the trial court as to citizenship, as the trial court found that diversity of citizenship between the plaintiff and the defendants, and the defendants and cross-petitioners, existed. (Tr. p. 85.)

Also in this connection on the question of residence, the court could properly consider for purposes of determining citizenship and residence and jurisdiction, the averments of the defendant E. A. Kelleam and Nell Southard in their amended petition for approval of final account and for decree determining heirship and distribution. (Tr. pp. 43 and 44.)

In addition to this we are aided by the presumption that a person's residence carries with it a presumption of citizenship of the place where he resides unless there is positive testimony to disprove the citizenship.

> *Devanney* v. *Hanson, et al.*, 60 W. Va. 3, 53 S. E. 603;
> *In re Person's Estate, Wallerstedt, Consul,* v. *Trank,* 146 Minn. 230, 178 N. W. 738;
> *Collins* v. *Ashland,* 112 F. 175.

No evidence to rebut the presumption was introduced by the defendants.

CONCLUSION.

In addition to all the foregoing, we conclude with the assertion that nothing has been raised in petitioners brief to invoke the jurisdiction of this court under a writ of certiorari. Petitioners rely on Para. 5 (b) of Rule 38. We submit that an analysis of all the points raised under their petition or brief disclose that no showing has been made sufficient to entitle them to a writ of certiorari. We assert that the decision of the Circuit Court of Appeals does not conflict with any decisions of any other Circuit Court of Appeals. The court's decision was not in conflict with any Oklahoma decisions, but on the contrary followed them. The case does not present any question of Federal law that has not been settled by this Court. Its decision conflicts with no other decisions of this Court. The decision does not depart from the accepted and usual course of judicial proceedings, but on the contrary substantial justice was done.

The evidence in this case is clear that a fraud was committed upon the half-blood heirs of Leggette D. Kelleam, deceased. These heirs are likely to have a recovery of their portion of the estate. If they cannot reach their share in the hands of those who wrongfully obtained it, naturally the surety, this respondent, will be called upon to pay, and to protect its right of exoneration this action was brought. The record in this case disclosed sufficient evidence to vest the United States District Court for the Northern District of Oklahoma with jurisdiction.

The facts in this case clearly support the contentions of this appellant that the original probate decree distributing the estate to the full-blood heirs was a void and wrongful decree because procured by fraud. No one has yet denied that the half-blood heirs are entitled to recover.

If this surety is called upon to pay and does pay, then unless this decision can be sustained and affirmed, there will be no assets left in the hands of E. A. Kelleam and Nell Southard from which it can reimburse itself after it has paid the defrauded heirs under its bond. The petition for certiorari should therefore be denied.

Respectfully submitted,

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